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No. 86-276

In the Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM CONWAY, COMMISSIONER OF MOTOR VEHICLES, STATE OF VERMONT, *et al.*,
Cross-Petitioners

v.

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,
Cross-Respondents

On Conditional Cross-Petition for a Writ of Certiorari to the Supreme Court of Vermont

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BRIEF FOR AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., IN RESPONSE TO CONDITIONAL CROSS-PETITION

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The petition in No. 86-69 raises the important question whether the State of Vermont may, consistently with the Commerce Clause and the Fourteenth Amendment, refuse to refund taxes exacted in violation of the Constitution. In its conditional cross-petition, the State points out that the premise of this refund claim is the unconstitutionality of the taxes that motor carriers have been compelled to pay. Vermont accordingly asserts that if the Court reviews the correctness of the refusal to order a refund, it should at the same time review the holding invalidating the taxes in question.

1. We agree. At stake are fundamental questions about the protections afforded interstate commerce by the federal Constitution. Indeed, as the State correctly

notes (Cross-Pet. 7, 9), a direct conflict has emerged on the issue whether a state may enact a highway use tax structured so that it is paid solely by interstate commerce, and from which its own domiciliaries are effectively exempted, and defend it on the ground that locally-based motor carriers already pay other, different taxes. Now before the Court is the American Trucking Associations' appeal from the conflicting decision of the Supreme Court of Pennsylvania. *American Trucking Associations, Inc.* v. *Scheiner*, appeal docketed, No. 86-357 (U.S. Sept. 3, 1986). We have urged the Court to undertake plenary review of the discrimination issue in *Scheiner*, and we would not ask or expect the Court to require Vermont to pay a refund if Pennsylvania's indistinguishable tax were upheld.

2. Our agreement with Vermont goes no further. The State's efforts to defend the merits of its taxes are wholly unconvincing, for the reasons set forth in the Vermont Supreme Court's decision and explained at pages 18-24 of the Jurisdictional Statement in *Scheiner*. We do not here repeat those arguments. There are, however, a few specific points that should be made.

To begin with, Vermont appears to defend its taxes in part on the ground that interstate commerce can be made to pay its own way. It cites *Complete Auto Transit* and offers a strained and unrealistic hypothetical that appears to be predicated on the erroneous assumption that the entire cost of highway construction and upkeep must be funded by registration fees for Vermont-based vehicles (Cross-Pet. 11-12). But we have never suggested that interstate commerce should not be required to bear its fair share of any state's highway expenses. See *Scheiner* J.S. 15. We have insisted only that the Commerce Clause protects it from parochial and discriminatory legislation that shifts to interstate commerce and away from local highway users a disproportionate share of those costs.

The question is simply whether a tax structured to fall solely upon non-Vermont-registered trucks can overcome the constitutional prohibition of discrimination against interstate commerce. In answer to this question, Vermont points vaguely in the direction of its registration fees, which are not imposed directly on vehicles registered in other states, and invokes the compensatory tax doctrine. This argument is unconvincing because of the State's failure to recognize that foreign-registered carriers already indirectly pay Vermont registration fees by virtue of reciprocity. See Pet. App. 8a-9a. It is also flawed by the State's complete failure to cite, much less discuss, cases decided by this Court after 1981 that shed important light on the application of the compensatory tax doctrine, especially *Armco, Inc. v. Hardesty*, 467 U.S. 638 (1984). As noted above, the Jurisdictional Statement in *Scheiner* sets forth the application of these principles to highway use taxes such as those of Vermont and Pennsylvania.

3. Assuming, as both sides to this case agree, that the Commerce Clause issue requires this Court's consideration, the question remains whether that should be done here, in *Scheiner*, or by granting review in both cases. We believe that the Court should at a minimum note probable jurisdiction in *Scheiner*. That case presents not only the substantive issue of structural discrimination on which the Supreme Courts of Vermont and Pennsylvania are in direct conflict but also a second, related highway tax issue of great legal and practical significance: the permissibility under the Commerce Clause of facially neutral taxes that are significantly discriminatory in practical operation.* The petition in No. 86-69 complements these issues by adding the important question whether the Constitution permits a state to refuse

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* This second issue is also presented by the pending appeal in *American Trucking Associations, Inc.* v. *Gray*, appeal docketed, No. 86-358 (U.S. Sept. 3, 1986).

to refund a tax exacted in violation of the Commerce Clause.

In sum, we believe that the Court should grant review both in *Scheiner* and in No. 86-69, giving it the opportunity to consider at one time the full range of these issues, and should hold the cross-petition in No. 86-276. In the alternative, the Court may prefer to hold both No. 86-69 and No. 86-276 pending a decision in *Scheiner*.

Respectfully submitted.

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